IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2564 OF 2007
IN
SUIT NO.1907 OF 2007

Gopal P. Mavani & Anr. ....Plaintiffs
V/s.

Nafisa Afroz Alam & Ors. ....Defendants

Mr.Jayesh Bhatt for the Plaintiffs.

None for the Defendants.

CORAM : S.J. VAZIFDAR, J.
DATED : 3RD SEPTEMBER, 2007.

P.C. :

1. The suit is filed under Section 6 of the Specific Relief Act for a decree, ordering the Defendants to hand over vacant and peaceful possession of the suit flat.

2. Plaintiff No.2 is the wife of Plaintiff No.1. Defendant No.2 is the husband of Defendant No.1. Defendant No.3 is the second Defendant's brother.

3. The Plaintiffs case is that they are the owners of the suit flat having acquired the same by a deed of transfer dated 20.4.1995. There is no dispute

regarding the same. The only question is whether the Defendants had purchased the said flat under the alleged agreement, I will shortly refer to.

4. The Plaintiffs case is that they had been residing in the suit flat since and had been paying all the taxes and outgoings in respect thereof. In the year 2001, they acquired another flat in another building in the name of Plaintiff No.1 and his son. The Plaintiffs thereafter shifted to the new flat. Some items and furniture belonging to the Plaintiffs such as steel cupboards, dinning table and chairs, beds etc. remained in the suit flat. The Plaintiffs used to keep the said flat locked and kept the duplicate key with the neighbour. They had lived in the suit flat for many years. Their relations with the neighbours were cordial. Defendant Nos.2 and 3 also have flats in the same building. The relationship between the Plaintiffs and the Defendants were cordial.

5. In June, 2006, Defendant No.3 requested Plaintiff No.1 to permit him to store his cartons containing the belongings of Defendant No.2, who was to return to India on a Transfer of Residence (TR) basis. Considering the relationship between the

parties, the Plaintiffs permitted the Defendants to store their cartons in the said flat. Defendant No.2 returned to India on a TR basis. Understandably therefore there were a large number of cartons.

6. The Plaintiffs desired to sell the suit flat. They therefore, requested the Defendants to remove their belongings from the suit flat. The Defendants however, requested for some time representing that they would have to make alternate arrangements. On 3.4.2007 they also requested the Plaintiffs to give them a duplicate key to enable them to shift the cartons within three to four days which the Plaintiffs did considering their relationship.

7. According to the Plaintiffs, instead of removing the cartons, Defendant No.1 filed Suit No.1354 of 2007 in the Bombay City Civil Court on 6.4.2007 for an order restraining the Plaintiffs from disturbing their possession except by due process of law. In support of their contentions, the Defendants relied upon the alleged agreement dated 15.9.2006, alleged receipt for Rs.17,00,000/- dated 15.9.2006 and the alleged letter of possession also dated 15.9.2006.

8. It is difficult to accept the genuineness of

agreement dated 15.9.2006. Clause 2 of the agreement read as under :-

> "2. The Transferor hereby agrees to sell, transfer, convey and assign his right title in the said Flat No.201, to the Transferee for the total consideration of Rs.22,00,000/- (Rupees Twenty Two Lakh only) out of which the Transferee has paid Rs.11,00,000/- (Rupees Eleven Lakhs only), i.e. Rs.5,00,000/- (Rupees Five Lakh only) in May, 2006, Rs.2,00,000/- in July, 2006 and Rs.4,00,000/- in August, 2006 and has paid further Rs.6,00,000/- on or before execution of these presents, to the Transferors making a total part consideration amount paid Rs.17,00,000/- (Rupees Seventeen Lakhs only) and balance consideration of Rs.5,00,000/- will be paid by the Transferee at the time transfer of the said Flat and Shares in the said society in his name."

. It is difficult to believe that the Plaintiffs agreed to sell the suit flat admeasuring 689 sq.ft. at a price of Rs.22,00,000/- at Mahim, Mumbai. Apart from that it is important to note that the Defendants case is that a sum of Rs.17,00,000/- had already been paid and balance amount of Rs.5,00,000/- remained to be paid. Further according to the Defendants, an amount of Rs.17,00,000/- had been paid in cash. It is impossible to believe that it was agreed between the parties that the entire amount would be paid in cash. The price had allegedly been reflected in the agreement itself. There is no

reason therefore for the Plaintiffs to have insisted for payment in cash.

9. It is further pertinent to note that it is not even the Defendant's case in the affidavit in reply that all the necessary forms had been executed for the transfer of the said flat in the name of the Defendants in the records of the society.

10. It is even more important to note what transpired in the proceedings filed in the Bombay City Civil Court by Defendant No.1. By an order dated 7.4.2007, the learned Judge appointed a Commissioner to visit the flat to verify and file a report regarding the possession thereof. The Plaintiffs' advocate was also required to file a list of articles which according to them were lying in the suit flat which they did. It would be useful to set out what happened thereafter as stated in paragraphs 8, 9 and 10 of the plaint, which read as under:-

> "8. The Plaintiff No.1 alongwith Vivek the son of the Plaintiffs and Mr.Kirit Mehta a friend of Plaintiff No.1 and their Advocate attended City Civil Court before HHJ Shri S.J.Shah on 07.04.2007 at 2.30 p.m. as required by Notice. At the hearing Advocate for Plaintiff No.1 informed the Lrd.Judge that the claim of Defendant No.1 that she had purchased the suit Flat from Plaintiff No.1 and has been handed over possession by

Plaintiff No.1 is clearly false in so far as all the documents are forged and fabricated and the Flat was in possession of Plaintiff and their articles and belongings were lying therein. Thereupon the Lrd.Judge appointed Commissioner to visit the Flat to very and file report of factual position at Flat (suit premises). Plaintiffs' Advocate was also required to file list of their articles lying the suit Flat. Accordingly a list of articles was handed over by the Advocate for Plaintiff No.1. After the hearing as Plaintiff No.1 was coming out of Court alongwith his son and Mr.Kirit Mehta, Plaintiff No.1 head Defendant No.2 who was present in Court personally, giving directions to someone from his cell phone to change lock on the door and to remove cupboards from Flat. Plaintiff No.1 also saw the Defendant No.2 leaving Court premises in a hurry. Plaintiff No.1 realized that the Defendant No.2 was upto some mischief. Plaintiff No.1 therefore instructed his son Vivek to go to Kshitij Building with all keys, camera and new film roll and take photographs if any untoward incident takes place or Defendants try to play any mischief.

9. The Plaintiffs say that their son alongwith Mr.Dilip Thakker the brother-in-law of Plaintiff No.1 and servant Naresh Prajapati went to Kshitij Building with canon camera at 4:30 p.m. There the son of Plaintiffs were shocked to find Defendant No.2, said Dilshad Alam and some unknown persons loading steel cupboard of Plaintiffs which was lying in the suit premises ; building loaded in a red coloured tempo bearing No.MH-01-2969 in the compound of building. On seeing this, son of Plaintiffs started taking photographs with his camera. Thereupon Defendant No.2 and said Dilshad and one unknown person rushed towards the son of Plaintiffs menacingly and assaulted him by giving him some punches and some slaps on his face. Defendant No.2 threatened the son of Plaintiffs of dire consequences if he tried to come in their way. They also snatched camera from Plaintiffs' son wherein he had taken photographs of cupboard loaded in the

tempo as aforesaid. Sensing danger to their lives or limb the son of the Plaintiffs said Mr.Dilip Thakkar and servant retreated from the compound of Kshitij Building and went to Mahim Police Station to seek their help. But Police Officer Mr.Mulani who was the Duty Officer at that time refused to take down any Complaint from son of Plaintiffs or to take any action in the matter. Plaintiffs say that fortunately for them their said neighbour Mr.Lobo who stays on 3rd Floor of Kshitij Building also happened to see the said incident of removal of cupboard of Plaintiffs in the tempo and assault on son of Plaintiffs. Realising the mischief and high handed action on the part of the Defendants said Mr.Lobo took photographs of the entire incident from his Flat with his daughter's cell phone. Said Mr.Lobo has also made affidavit to that effect in the Hon'ble City Civil Court. Plaintiffs crave liberty to refer to and rely upon the said Affidavit of Mr.Lobo and the CD prepared by him containing photographs of said incident and certain other relevant facts as more particularly narrated hereafter. Mr.Abdul Qayyum has also filed his Affidavit in the City Civil Court testifying the facts about the matter. Plaintiffs crave liberty to refer to and rely upon the Affidavit of Mr.Abdul Qayyum. Annexed hereto and marked Ex."E" is a copy of said Affidavit dated 16.4.2007 of Mr.Joseph Lobo. Annexed hereto and marked Ex."F" is a copy of said Affidavit dated 16.4.2007 of Mr.Abdul Qayyum.

10. Plaintiffs say that on 09.04.07 he filed written Complaint with DCP, ACP and Senior Inspector of Mahim Police Station, narrating the aforesaid criminal and high handed act and conduct on the pat of Defendant Nos.2 and 3 and others. Annexed hereto and marked EX."G" is a copy of said Written Complaint. In pursuance of said Written Complaint Statement of the Plaintiff No.1 was recorded by the Police on 11.04.07. On 12.04.07 A.P.I. Mr.Rajbhar asked the Plaintiff to meet him with his brother-in-law Dilip Thakkar for recording his statement. Accordingly on 12.04.07 the Plaintiff No.1

alongwith Mr.Dilip Thakkar went to the Beat Office where Mr.Rajbhar was having his posting for recording the statement of Mr.Dilip Thakkar. Around that time Plaintiffs received a call on his cell phone from Mr.Joseph Lobo that Defendant Nos.2 and 3 were loading another cupboard of Plaintiffs on a handcart to remove the same to a different place. Plaintiff informed Mr.Rajbhar about this message. Mr.Rajbhar told Plaintiff that all of them would go to the site immediately to find out if and what was happening. Accordingly they walked up to the Kshitij Building which is very close to the Beat office where they were sitting. On reaching there Plaintiff No.1 spotted his cupboard on handcart which was being pulled away by one person. Plaintiff No.1 informed Mr.Rajbhar accordingly. A.P.I. Mr.Rajbhar intercepted the handcart and questioned the cart puller about the place from were he brought the cupboard. The cart puller informed him that he had brought it from first floor of Kshitij Building. At that time Defendant No.2 rushed there and started claiming that the cupboard belonged to him and that it was allegedly sold to him by Plaintiff No.1 with the Flat.He claimed that he was having the key of the cupboard. Thereupon Plaintiff No.1 contacted his son over cell phone and asked him to come with the key of the said cupboard which were lying in Plaintiff's said flat at Prabhadevi. Defendant No.2 brought duplicate key of the said cupboard and opened it in the presence of Mr.Rajbhar. Thereafter son of Plaintiffs came with the original key of the cupboard which were lying at said Prabhadevi flat of Plaintiffs. The Plaintiff No.1 opened the cupboard with the said original key in the presence of Mr.Rajbhar. Thereupon the said Inspector seized the cupboard original key of Plaintiffs and the duplicate key of Defendant No.2 under Panchanama. Plaintiffs crave liberty to refer to and rely upon the said Panchanama."

11. The Defendants and their advocates remained absent on the last occasion. They remained absent

today. I, therefore, do not think it necessary to see the video/photographs relied upon by the Plaintiffs. Nobody has appeared to refute or to question the authenticity thereof.

12. There is nothing on record which even remotely suggests that the Defendants in fact resided in the suit flat during the period June, 2006 to April, 2007, such as electricity bill, correspondence or the society bills.

13. Thus the Plaintiffs have made out more than just and arguable case to establish their possession. They have also made out a strong case that the suit flat was permitted to be used by the Defendants only gratuitously and only to store their cartons.

14. In the circumstances the Notice of Motion is made absolute in terms of prayer (a). The Plaintiffs shall however after being put in possession, not dispose of, alienate or encumber the suit flat or create any third party right, title and/or interest in respect thereof for a period of eight weeks after being put in possession pursuant to this order.